

**Letter of Findings: 03-20130694**  
**Withholding Tax**  
**For the Years 2010, 2011, and 2012**

**NOTICE:** IC § 6-8.1-3-3.5 and IC § 4-22-7-7 requires the publication of this document in the Indiana Register. This document provides the general public with information about the Department's official position concerning a specific set of facts and issues. This document is effective on its date of publication and remains in effect until the date it is superseded or deleted by the publication of another document in the Indiana Register.

**ISSUE**

**I. Withholding Tax – Audit Assessment.**

**Authority:** IC § 6-8.1-5-1(a); IC § 6-8.1-5-4(a); IC § 6-8.1-5-1(b); [45 IAC 3.1-1-97](#).

Taxpayer argues that the Department erroneously assessed additional Withholding Tax.

**STATEMENT OF FACTS**

Taxpayer is an Indiana business which operates a combination gas station, convenience store, and fast-food restaurant.

Taxpayer entered into an agreement with a national petroleum company to sell gasoline at its location.

Taxpayer receives 50 percent of the gross profits received from gasoline sales.

Taxpayer operates a nationally branded fast-food restaurant at its business location.

Taxpayer's convenience store sells tobacco products, groceries, snack foods, beverages, coffee, and general merchandise. The convenience store also sells lottery tickets, money orders along with accepting payments for utility bills.

The Indiana Department of Revenue ("Department") conducted an audit of Taxpayer's business records and tax returns. The audit resulted in the assessment of additional sales, withholding, individual income, and wireless prepaid card tax.

The Department's audit began in February 2013. Taxpayer was informed on February 28, 2013, that the audit would require an opportunity to review Taxpayer's books and records.

On February 18, 2013, Taxpayer was again notified that the audit needed to review Taxpayer's records. During the course of the ten month audit, Taxpayer was repeatedly asked to produce business records and missing tax returns. During the four-hour September 5, 2013, "closing conference" with Taxpayer's representative and one of Taxpayer's owners, the Taxpayer was asked to produce the missing documentation no later than September 6, 2013.

In the absence of the requested records, the Department issued proposed assessments based on the best information available. Taxpayer disagreed with the assessments and submitted a protest to that effect. An administrative hearing was conducted by telephone during which Taxpayer's representative explained the basis for the protest. This Letter of Findings results.

**I. Withholding Tax – Audit Assessment.**

**DISCUSSION**

Taxpayer disagrees with the Department's assessment of additional withholding tax.

The Department's audit found as follows:

Taxpayer has not filed any WH-3's since its inception. The auditor asked Taxpayer to prepare these returns and provide the appropriate W-2's for filing. The returns were not provided and have not been filed. Taxpayer did provide W-2's for 2010 and 2012 and states other W-2's cannot be secured. Auditor requested a listing of employees' names, addresses, and social security numbers who worked during the audit period, but this, too, was not provided.

The Department's audit found that "[a] review of the W-2's provided indicate payroll withholding taxes for a level of payroll that is not reasonable for Taxpayer's business [and] did not provide any time cards that would document workers' hours."

In the absence of substantive documentation, the audit estimated the amount of withholding tax.

Based on auditor's experience and data provided by bizstats.com, payroll for a retailer with Taxpayer's level of sales should be significantly higher than what was reported. Therefore, it was necessary to estimate wages.

The audit imposed this assessment under authority of [45 IAC 3.1-1-97](#) which states in relevant part as follows:

Withholding Agent's Returns and Reports to the Department. Employers who make payments of wages subject to the Adjusted Gross Income Tax Act, and who are required to withhold Federal taxes pursuant to the Internal Revenue Code (USC Title 26), are required to withhold from employees' wages Adjusted Gross and County Adjusted Gross Income Tax.

Withholding agents who are required to withhold Indiana Adjusted Gross Income Tax and County Adjusted Gross Income Tax (where applicable), shall make return of and payment to the Department monthly

whenever the amount of tax due, for either County and State, exceeds an aggregate of \$50 per month with such payment due on the thirtieth (30th) day of the following month. Where the aggregate amount of tax due under the Adjusted Gross Income Tax or County Adjusted Gross Income Tax does not exceed \$50 per month, payment and return of the amount of tax due shall be made quarterly, with such payment due on the last day of the month following the end of the quarter. The following criteria should be used:

(1) A withholding agent who falls within the monthly reporting system, due to maintaining an aggregate of fifty dollars (\$50) per month, but who in any month thereafter may maintain an aggregate of less than fifty dollars (\$50) per month, should remit that lesser amount on a monthly basis so as to maintain the status of being on the monthly system.

(2) A withholding agent who falls within the quarterly reporting system, due to not maintaining an aggregate of fifty dollars (\$50) per month, but who in any month thereafter does maintain an aggregate of fifty dollars (\$50) per month, should then, and thereafter, begin reporting and making returns on a monthly basis and thereby maintain the status of being on the monthly system.

Under [45 IAC 3.1-1-97](#), Taxpayer was required to withhold and remit county income tax.

In the absence of the necessary records, IC § 6-8.1-5-1(a), authorizes the Department, if it reasonably believes that a taxpayer has not reported the proper amount of tax due, to make a proposed assessment of unpaid tax on the basis of the best information available to the department.

If the department reasonably believes that a person has not reported the proper amount of tax due, the department shall make a proposed assessment of the amount of the unpaid tax on the basis of the best information available to the department. The amount of the assessment is considered a tax payment not made by the due date and is subject to [IC 6-8.1-10](#) concerning the imposition of penalties and interest.

Each taxpayer is required to maintain records sufficient to determine the amount of tax due. IC § 6-8.1-5-4(a) reads as follows:

Every person subject to a listed tax must keep books and records so that the department can determine the amount, if any, of the person's liability for that tax by reviewing those books and records. The records referred to in this subsection include all source documents necessary to determine that tax, including invoices, register tapes, receipts, and canceled checks.

The initial audit determination of a taxpayer's liabilities arrives with a presumption of correctness. IC § 6-8.1-5-1(b) states that "[t]he notice of proposed assessment is prima facie evidence that the department's claim for the unpaid tax is valid. The burden of proving that the proposed assessment is wrong rests with the person against whom the proposed assessment is made."

Taxpayer failed to maintain or provide the records necessary for the audit to verify Taxpayer's withholding tax liabilities as required under IC § 6-8.1-5-4(a). There is nothing to indicate that the 2010, 2011, and 2012 tax assessments were based upon faulty, incomplete information or that the Department erred in relying on the "best information available" at the time the audit was conducted. However, Taxpayer has belatedly submitted z-tape monthly summaries approximately one year after the audit began. The newly revealed z-tapes purportedly establish that the convenience store had a lesser amount of sales than originally reported. With that in mind, the Department is prepared to agree that the Audit Division should review the original audit findings, review Taxpayer's additional z-tapes, and make whatever adjustments to the original assessment as may be warranted.

#### **FINDING**

Taxpayer's protest is sustained subject to the result of the supplemental audit review of the newly submitted z-tapes.

*Posted: 05/28/2014 by Legislative Services Agency*

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